

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Victoria's Secret Brand Management, Inc.	:	
	:	
Plaintiff/Appellant,	:	
	:	
	:	Case No.: 07-cv-5804 (GEL)
	:	
v.	:	
	:	
Sexy Hair Concepts, LLC	:	
	:	
Defendant/Appellee.	:	
	:	
	:	

DECLARATION OF JOHN F. METZGER

John F. Metzger declares:

1. I am a citizen of the United States, over 18 years old and a resident of Montgomery County in the Commonwealth of Pennsylvania.
2. I am employed as a legal assistant with Eckert Seamans Cherin & Mellott, LLC in Philadelphia, Pennsylvania.
3. I have worked as a paralegal since October of 1994 and was employed at Ballard Spahr Andrews & Ingersoll, LLP in Philadelphia, Pennsylvania from September 1997 until February 2008 when I joined the firm of Eckert Seamans Cherin & Mellott, LLC .
4. My duties include general, internet and legal research, litigation support, document review and analysis, document organization and control, and electronic discovery support among others.
5. A search of the U.S. Patent & Trademark Office website shows that Victoria's Secret Stores Brand Management, Inc. owns registered trademark Nos. 2,754,457 for

“BEACH SEXY” for swimwear, and 2,776,825 for “SEXY SUPPORT” for lingerie. The terms “BEACH” and “SUPPORT” respectively were disclaimed by the applicant. True and correct copies of the status of U.S. Trademark registrations 2,754,457 and 2,776,825 as downloaded from the U.S. PTO’s TARR system are attached hereto as Exhibit A.

6. Plaintiff/Appellant produced an expert report by Gerald L. Ford entitled “Likelihood of Confusion Survey.” Attached as Appendix F to Volume II of the Ford report is a listing of the professional interviewing services and locations used by Dr. Ford to conduct the surveys. All nine of these interview services were located in shopping malls in their respective markets. A review of the store directories on the websites of these shopping malls shows that Victoria’s Secret stores are located in eight of the nine malls, and Victoria Secret’s Beauty stores are located in two of the nine malls. (The Hickory Ridge Mall in Memphis, Tennessee does not contain either Victoria Secret’s retail location). A true and correct copy of Appendix F to Dr. Ford’s Volume II to his Likelihood of Confusion Survey is attached hereto as Exhibit E. True and correct copies of the website printouts from the nine malls referenced in Appendix F to Dr. Ford’s report are attached hereto as Exhibit B.

7. As a trademark paralegal, I have considerable experience searching the internet with Google’s search engine. On May 1, 2008 I conducted a search on Google for “‘sexy hair’ hair care”. True and correct copies of the Google search, the first 100 results and results 991 through 1000 are attached hereto as Exhibit C.

8. Within the first 100 results of this Google search, 85 results link to webpages referencing Sexy Hair Concepts or its product line. Within the range of results between 991 and 1000 (the last viewable group of webpage results), 6 of these 10 results link to webpages referencing Sexy Hair Concepts or its products.

9. As Google explains on its help page, a search using the Google engine produces “a list of web pages related to your search terms, with the most relevant page appearing first, then the next and so on.” A true and correct copy of Google’s Web Search Help Center printout is attached hereto as Exhibit D. Often a search can return hundreds of thousands or even millions of web page results, but not all of those results are viewable. Generally, Google permits a user to view the first 100 results with the option to expand the viewable results to the first 1000. Since each result from Google pertains to a single web page, there could easily be multiple results for a specific website, especially large websites that offer products for sale and contain hundreds of web pages (e.g., Amazon, e-Bay, Yahoo shopping, etc.).

10. Placing quotation marks around a group of words indicates to Google’s search engine that the results returned should contain the exact phrase within the quotation marks. Google also permits a user to exclude certain terms by placing a minus sign (“-”) in front of words. However, as Google’s help page explains, the minus sign is used for search terms that have “more than one meaning,” and the minus sign indicates excluding from the search web pages with the word or words “related to the meaning you want to avoid.” The example shown on Google’s help page is as follows:

“For example, here’s how you’d find pages about bass-heavy lakes, but not bass-heavy music:

bass – music” (See Exhibit D).

Excluding the term “sexyhair” from a search for “sexy hair” would have little effect in removing references to a company called Sexy Hair from general references to hair that is referred to as sexy. In fact, as Google’s help page states, “Google only returns pages that include all of your search terms,” so a search for the term “sexy hair,” regardless of how the

search was limited with negative terms¹, would still return pages that contain both words – “sexy” and “hair.” Any webpages that referred to Sexy Hair Concepts or its product line (which includes both words in each and every product title; e.g., Big Sexy Hair, Silky Sexy Hair, etc.) would be included in the Google results for the search “sexy hair” regardless of how many negative terms were excluded from the search.

11. On May 2, 2008, I visited the website www.archive.org to use their search tool entitled the “wayback machine” to locate archived copies of a website’s homepage. I reviewed the archived examples of Paul Labrecque’s website located at paullabrecque.com and found that the website was being redesigned during 2005. According to the archived webpages, the tag line “simple, sexy, sophisticated” first appeared on Mr. Labrecque’s website in or around December 2005. True and correct copies of these archived webpages printed from the website www.archive.org are attached hereto as Exhibit F.

12. On May 2, 2008, I visited the website www.paullabrecque.com to identify the salon services, locations, and clientele for Paul Labrecque Salon & Spas in New York City. True and correct copies of these webpages printed from the website www.paullabrecque.com are attached hereto as Exhibit G.

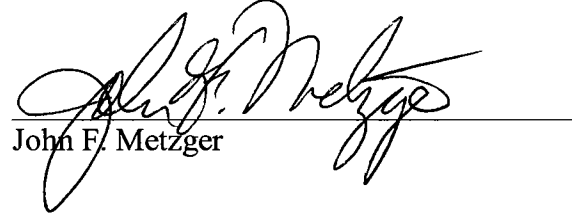
13. A search of the U.S. Patent & Trademark Office website shows that Sexy Hair Concepts, LLC owns registered trademark Nos. 3,247,541 for “SHORT SEXY”; 3,247,540 for “HEALTHY SEXY”; and 3,374,913 for “STRONGSEXYHAIR” all for a variety of hair care products. True and correct copies of the status of U.S. Trademark registrations 3,247,541,

¹ It is possible to craft a search whereby a negative term subtracts one of the core terms of the actual search. For example, a search for “sexy hair” could be run with the modifier “– sexy” which would suppress any webpages referencing the term “sexy.” However, this would effectively return the same results as a search for the term “hair” and would therefore be impractical as a search strategy.

3,247,540 and 3,374,913 as downloaded from the U.S. PTO's TARR system are attached hereto as Exhibit H.

I declare under penalty of perjury that the foregoing is true and correct.

Date: May 2, 2008



John F. Metzger

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CERTIFICATE OF SERVICE

I hereby certify that on the date shown below , copies of the documents listed below were served upon Frank J. Colucci, Esquire of COLUCCI & UMANS, 218 East 50th Street, New York, NY 10022, counsel for Plaintiff/Appellant, by Federal Express next day delivery:

- Defendant/Appellee's Motion and Memorandum for Summary Judgement
- Defendant/Appellee's Rule 56.1 Statement of Material Facts
- Motion in Limine of Defendant Sexy Hair Concepts, LLC to Preclude Testimony of Edward Finegan, Ph.D.
- Motion in Limine of Defendant Sexy Hair Concepts, LLC to Preclude Testimony of Paul LaBrecque
- Motion in Limine of Defendant Sexy Hair Concepts, LLC to Preclude Expert Report of Dr. Gerald L. Ford
- Motion in Limine of Defendant Sexy Hair Concepts, LLC to Preclude Survey and Expert Report of Dr. Michael B. Mazis
- Declaration of James Morrison in Support of Motion for Summary Judgment
- Declaration of John F. Metzger in Support of Motion for Summary Judgment

May 2, 2008
Date

John F. Metzger